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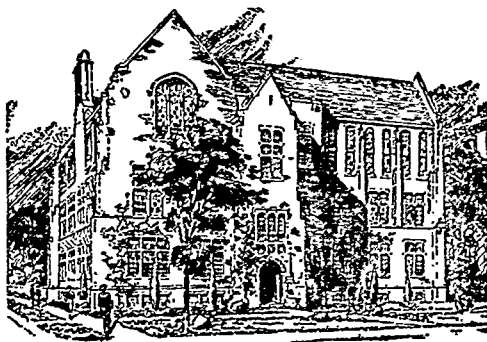
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## EFFECT OF PRESUMPTIONS\*

RAYMOND I. GERALDSON†

THE definitions of presumptions are legion. In addition to the great number appearing in the reported cases, many have been suggested by the leaders of thought among the text writers in the field of evidence. From among these a few have been selected to orient our thinking on this subject. The late Professor Burr W. Jones defined a presumption as an inference of the existence of one fact from the existence of some other fact.<sup>1</sup> Professor Lawson in his work on Presumptive Evidence states that a presumption is a rule of law permitting or requiring courts of justice to draw a particular inference from a particular fact or from particular evidence, unless and until the truth of such inference is disproved.<sup>2</sup> Professor Wigmore states that a presumption is a rule of law which attaches to one evidentiary fact certain consequences as to the duty of production of other evidence by the opponent.<sup>3</sup> For the purposes of this discussion still another defini-

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\* The substance of this paper was presented at the Fall Institute of the State Bar Association of Wisconsin.

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<sup>1</sup> 1 JONES, THE LAW OF EVIDENCE IN CIVIL CASES (4th ed., 1938) 13.

<sup>2</sup> LAWSON, LAW OF PRESUMPTIVE EVIDENCE (2d ed., 1899) 639.

<sup>3</sup> 4 WIGMORE, EVIDENCE (1905) § 2491.

tion may be formulated somewhat as follows: A legal presumption is a rule of law which creates an artificial probative relation or recognizes a naturally existing probative relation between two specific facts, one of which is proved and the other unproved.

It is generally agreed by writers on the subject that presumptions may be classified in two categories: first, presumptions of the law, and second, presumptions of fact. There are other classifications, however, such as the more entertaining one proffered by Lord Coke, who said that presumptions consist of "three sorts, viz., violent, probable, and light or temerary."<sup>4</sup> Professor Wigmore decries the effort to classify presumptions, contending that the term "presumption of fact" should be disregarded as useless and confusing. He states that there is but one real kind of presumption, namely, the presumption of law.<sup>5</sup> This divergence of view is but the logical projection of Wigmore's theory that the presumption is "not the fact itself, nor the inference itself, but the legal consequence attached to it." That legal consequence, according to Wigmore, consists of placing upon the opponent of the presumed fact the burden of producing evidence to the contrary, at the risk of the jury being compelled to conclude in favor of the presumed fact.<sup>6</sup>

The presumption of law has been said to be an artificial presumption which the law creates whereby one fact is presumed to exist if another fact is proved, although the proven fact is not in itself direct evidence of the presumed fact.<sup>7</sup> The basis in policy for such presumption is generally either the common experience of mankind evidencing a customary or probable relationship between the proven fact and the presumed fact, or simply a rule of convenience or public policy. The classic illustration of a presumption of law is that of death after seven years' absence.

Presumptions of fact are logical or natural inferences of one fact from another. They have been said to be mere arguments, dependent upon their own natural force and efficacy in generating belief, which are to be judged by the common and received tests of the truth of propositions.<sup>8</sup> Because these presumptions of fact are inferences drawn by the ordinary reasoning powers with respect to which men may rationally differ, they are sometimes regarded as merely permissive inferences. They do not possess the artificial certainty which is characteristic of the judge-made or precedent-developed presumption of law. As an illustration of the presumption of fact, Judge Jones has aptly

<sup>4</sup> Coke on Littleton, 6, b (cited in *Wigmore on Evidence*, 1905, Vol. IV, § 2487 n. 4.)

<sup>5</sup> 4 WIGMORE, EVIDENCE (1905) § 2491.

<sup>6</sup> WIGMORE, EVIDENCE, *Idem*.

<sup>7</sup> 2 LAWSON, LAW OF PRESUMPTIVE EVIDENCE (2d ed., 1899) p. 639.

<sup>8</sup> 1 GREENLEAF, EVIDENCE, § 44.

cited the famous Biblical example of King Solomon's wisdom. Guided by the knowledge of the selflessness of mother love, the King, in the absence of other evidence, awarded the child to the one who was willing to give it up rather than have it cut in twain. The King thus acted upon a presumption of fact, namely, that the one who loved the child enough to give it up in order to save its life was the true mother.

The purpose of this paper is to compare that portion of the proposed Code of Evidence of the American Law Institute relating to the effect of presumptions with the established Wisconsin practice in that field. Rule 904 of Tentative Draft No. 2 of the proposed Code of Evidence sets forth the American Law Institute's proposed rules as follows:

"(1) \* \* \* when the basic fact of a presumption has been established in an action, the existence of the presumed fact must be assumed unless and until either evidence has been introduced which would support a finding of its non-existence or the basic fact of an inconsistent presumption has been established.

"(2) \* \* \* when the basic fact of a presumption has been established in an action and evidence has been introduced which would support a finding of the non-existence of the presumed fact

(a) if the basic fact has no probative value as evidence of the existence of the presumed fact, the existence or non-existence of the presumed fact is to be determined exactly as if the presumption had never been applicable in the action;

(b) if the basic fact has any probative value as evidence of the existence of the presumed fact, whether or not sufficient to support a finding of the presumed fact, the party asserting the non-existence of the presumed fact has the burden of persuading the trier of fact that its non-existence is more probable than its existence.

"(3) \* \* \* when the basic facts of two inconsistent presumptions have been established in an action,

(a) if the basic fact of each presumption either has no probative value, or has any probative value, as evidence of the existence of its presumed fact, the existence or non-existence of the presumed fact is to be determined exactly as if neither presumption had ever been applicable in the action;

(b) if the basic fact of one of the presumptions has no probative value as evidence of the existence of its presumed fact, and the basic fact of the other has any probative value of the existence of its presumed fact, whether or not sufficient to support a finding of the presumed fact, the party asserting the non-existence of the presumed fact of the other has the burden of persuading the trier that its non-existence is more probable than its existence."

As a matter of convenience the comparison of each of the above rules with the Wisconsin practice will be considered separately.

RULE 1. PRESUMPTION CONTROLS IN ABSENCE OF CONTRARY EVIDENCE OR CONFLICTING PRESUMPTION.

In considering the relation to the Wisconsin law of the rule first stated above, namely, that when a presumption is applicable to any given case, the existence of the presumed fact must be assumed unless and until either (a) evidence has been introduced which would support a finding of its non-existence, or (b) an inconsistent presumption has been shown to be applicable, one must first determine what evidence is sufficient in Wisconsin to support a finding. It appears to be established beyond question by the repeated declarations of the Wisconsin Supreme Court that in Wisconsin a jury finding will be sustained if it is supported by any credible evidence which under any reasonable view will admit of an inference supporting the finding, and a finding by the court if it is not against the great weight and clear preponderance of the evidence.<sup>9</sup> Examination of the Wisconsin cases with this latter rule in mind reveals that the Wisconsin practice is similar to the first rule contained in the American Law Institute's proposed Code of Evidence, namely, that a presumption will control in the absence of a conflicting presumption or of any credible evidence to the contrary.

In 1863 the Wisconsin Supreme Court declared that the presumption which attaches in favor of the legality and regularity of official acts must prevail against *doubtful* and *uncertain* testimony to the contrary.<sup>10</sup> Again in 1893 the Court stated that the presumption in favor of the regularity and validity of the action of public officers operates only in the absence of evidence, and that it disappears entirely in the presence of positive and uncontradicted evidence upon the subject.<sup>11</sup> In 1922, in a case involving the question of the proper verification of a complaint which appeared upon its face to have been sworn to before a Notary Public,<sup>12</sup> the Court recognized and gave effect to the presumption of regularity, holding that such presumption could not be overcome by uncertain, unreliable, and conflicting testimony.

In a decision rendered in the year 1902 the Wisconsin Supreme Court had occasion to discuss the presumption of the continuance of a condition, relationship, or state of things.<sup>13</sup> In the course of its opinion

<sup>9</sup> *Kramer v. Chicago, M., St. P. & P. R. Co.*, 226 Wis. 118, 123, 276 N.W. 113 (1937); *Sheehan v. Lewis*, 218 Wis. 588, 595, 260 N.W. 633 (1935); *Estate of Hatten*, 233 Wis. 199, 208, 288 N.W. 278 (1939).

<sup>10</sup> *Mills v. Johnson*, 17 Wis. 598 (1863).

<sup>11</sup> *Befay v. Wheeler*, 84 Wis. 135, 142, 53 N.W. 1121 (1893).

<sup>12</sup> *State ex rel. Cleveland v. Common Council of the City of West Allis*, 177 Wis. 537, 539, 188 N.W. 601 (1922).

<sup>13</sup> *State ex rel. Coffey v. Chittenden*, 112 Wis. 569, 578, 88 N.W. 587 (1902).

the Court approved and adopted from Greenleaf on Evidence the following statement of the general rule:

"When the existence of a person, a personal relationship, or a state of things is once established by proof, the law presumes that the person, relation, or state of things continues to exist as before, *until the contrary is shown, or until a different presumption is raised*, from the nature of the subject in question." (Italics supplied)

In other words, the presumed fact of the continuance of status must be assumed unless and until credible evidence to the contrary has been introduced or an inconsistent presumption has been raised. The same rule has been repeated by the Wisconsin Supreme Court in a series of subsequent decisions, and it now appears to be firmly established in the body of our law.<sup>14</sup> A similar declaration was made by the Wisconsin Supreme Court with respect to the presumption that the law of a foreign state is the same as that of Wisconsin,<sup>15</sup> and in the comparatively recent case of *State ex rel. Northwestern Dev. Corp. v. Gehrz*,<sup>16</sup> the Court said that the presumption of the continuance of a status would constitute the basis for a finding only in the absence of any credible evidence to the contrary; in other words, in the absence of evidence which would support a finding of the non-existence of the presumed fact. In the case of *Rayborn v. Galena Iron Works Company*<sup>17</sup> the principal issue was the validity of a release executed upon settlement of a personal injury claim. The case involved the proposition that one who signs an instrument is presumed to understand its contents. Against this presumption the plaintiff offered his own testimony to the effect that he did not understand the nature of the document which he signed. The Court after reviewing the evidence in this respect declared that that evidence was not sufficient to overcome the presumption, apparently because it did not consider the evidence credible.

It is submitted that the foregoing cases demonstrate that the Wisconsin practice is consistent with the first rule proposed by the American Law Institute in its Code of Evidence upon the matter of the effect of presumptions, and that in Wisconsin, as under the Code of Evidence, the presumed fact of any presumption which is applicable to a given case must be assumed in the absence of evidence which would support a finding of its non-existence, that is, in the absence of any credible evidence to the contrary, or in the absence of any applicable inconsistent presumption.

<sup>14</sup> *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, 503, 107 N.W. 500 (1906); *Rupert v. Chicago M. St. P. & P. R. Co.*, 202 Wis. 563, 568, 232 N.W. 550 (1930); *Krantz v. Krantz*, 211 Wis. 249, 248 N.W. 155 (1933).

<sup>15</sup> *Wenzel v. Great Northern R. Co.*, 152 Wis. 418, 422, 140 N.W. 81 (1913).

<sup>16</sup> *State ex rel. Northwestern Dev. Corp. v. Gehrz*, 230 Wis. 412, 422, 283 N.W. 827 (1939).

<sup>17</sup> *Rayborn v. Galena Iron Works Co.*, 159 Wis. 164, 169, 149 N.W. 701 (1914).

RULE 2. EFFECT OF PRESUMPTION AFTER INTRODUCTION  
OF CREDIBLE EVIDENCE TO THE CONTRARY.

In dealing with the situation created by the introduction of evidence sufficient to support a finding of the non-existence of the presumed fact, (in Wisconsin, credible evidence which is not contrary to the clear preponderance of the evidence), the American Law Institute's Code of Evidence distinguishes between a presumption in which the basic fact has no probative value as evidence of the existence of the presumed fact, and a presumption in which the basic fact has some (in the sense of any) probative value as evidence of the existence of the presumed fact. In the case of the former type of presumption the Code states that the question of the existence or non-existence of the presumed fact must be determined as if the presumption had never been applicable in the action. In the case of the latter type of presumption the Code says that regardless whether or not the basic fact of the presumption has sufficient probative value as evidence of the existence of the presumed fact to support a finding of the presumed fact (that is, in Wisconsin, regardless of whether or not the basic fact constitutes credible evidence of the existence of the presumed fact), the burden of persuasion is placed upon the party asserting the non-existence of the presumed fact.

It is to be noted that this second rule of the Code adopts an intermediate or moderate position between the orthodoxy of Thayer and Wigmore on the one hand, and the iconoclasm of Morgan on the other. Professor Wigmore steadfastly contends that a presumption never affects the burden of persuading the trier of the facts, and that the sole function of a presumption is to regulate or affect the burden of producing evidence.<sup>18</sup> Under Wigmore's view, the burden of persuasion with respect to a particular fact never changes throughout a trial although the burden of producing evidence with respect to it may change one or a number of times. Professor Morgan, conversely, advocates the adoption of a uniform statute providing that "the sole effect of every presumption shall be to place upon the opponent the burden of persuading the trier of fact of the non-existence of the presumed fact."<sup>19</sup> The problem poised by these divergent contentions is largely contained in the question whether a presumption in itself has any force as evidence. The Wisconsin cases will be considered in the light of this question.

In a very early decision the Wisconsin Supreme Court apparently took the position that a presumption of law has no probative force in

<sup>18</sup> 4 WIGMORE, EVIDENCE (1905) § 2491.

<sup>19</sup> Morgan and Maguire, *Looking Backwards and Forward at Evidence* (1937), 50 HARV. L. REV. 909, 913. (cited in 1938 WIS. L. REV. 623, n. 30).

itself, and, therefore, cannot affect the burden of persuasion. The Court in that case<sup>20</sup> made the following statement:

*"Prima facie*, the presumption of law is that the several acts or steps in the course of a legal proceeding take place in the order necessary to give them legal effect. But, whenever an inquiry into the priority of acts, on the same date, becomes necessary in order to protect the rights of parties, the ordinary presumption must give way to the facts of the case."

A somewhat similar declaration was made by the Wisconsin Supreme Court in the year 1870, in a case involving the presumption in favor of the correctness of official action.<sup>21</sup> The Court said,

"The presumption \* \* \* affords no aid to the plaintiff; and, besides, it is to be resorted to only where the proofs are doubtful, or in the absence of proof. The question must be decided upon the evidence, as it appears without the presumption."

A further development in the Wisconsin doctrine appeared in the case of *Spaulding v. The Chicago and Northwestern Railway Company*,<sup>22</sup> decided by the Supreme Court in the year 1873, wherein the following statement was made:

"But the learned counsel for the plaintiff very ingeniously argue, that the presumption that the defendant's locomotives were not properly constructed and equipped (which, it was held on the former appeal, arises in a case where the fires complained of are communicated from them), has the force and effect of testimony in the case; and that the question whether the testimony introduced for the purpose of overcoming such presumption is sufficient for that purpose, is necessarily a question of fact to be determined by the jury. The argument would probably be a sound one, were this a presumption of fact. Its weight and force, and consequently the amount of proof essential to overcome it, would in such case be for the jury, and not for the court, to determine. But the presumption under consideration is clearly one of law, and is governed by an entirely different rule. Its weight and effect, and the amount and character of the proof necessary to overcome it, are questions for the court, and were determined by this court on the former appeal. [See below.] In such cases, if there is a conflict of testimony, the jury must determine what facts are proved; but, where, as in this case, there is no such conflict, and the testimony is clear and satisfactory against the presumption, it is the duty of the court to hold, as matter of law, that the presumption is overcome."

<sup>20</sup> Knowlton v. Culver, II Pinney's Wisconsin Reports 246 (1849).

<sup>21</sup> Gough v. Dorsey, 27 Wis. 119, 128 (1870).

<sup>22</sup> Spaulding v. The Chicago & Northwestern Railway Company, 33 Wis. 582, 591 (1873).



Upon the first appeal in the *Spaulding* case<sup>23</sup> the Court considered the amount of proof necessary to rebut the presumption of negligence or of want of proper equipment saying,

"The presumption, therefore, of negligence or of the want of proper equipments, arising from the mere fact of fire having escaped, is not conclusive, nor, indeed, a very strong one, but, of the two, rather weak and unsatisfactory. It is indulged in merely for the purpose of putting the company to proof and compelling it to explain and show, with a reasonable and fair degree of certainty, not by the highest and most clear and unmistakable kind of evidence, that it had performed its duty in this particular."

By 1873 the Wisconsin Supreme Court had thus apparently taken the position that a presumption of law did not affect the burden of persuasion but merely placed upon the opponent of the presumed fact the burden of producing some credible evidence to the contrary, and that a presumption of fact, conversely, did affect the burden of persuasion, being itself possessed of the force and effect of evidence. Further examination of the cases will reveal that this early clarity of the Wisconsin law upon the subject of presumptions has not continued to the present day.

In 1875 the Wisconsin Supreme Court held that the presumption that an instrument was witnessed at the time of its execution could not be repelled or overcome by testimony which, though strong and positive in itself, was contradicted. The Court said that in order to justify a finding that the instrument was not witnessed until after it was executed and recorded, the evidence offered would have to be clear and satisfactory.<sup>24</sup> The presumption, although one of law, was thus permitted to affect the burden of persuasion.

In the case of *Reeves v. Midland Casualty Company*,<sup>25</sup> the Court considered the presumption of receipt by the addressee of an article which has been mailed. The case concerned the question of notice of illness under a health and accident insurance policy. The president of the insurance company testified that the notice was not received. The Court said that such testimony did not operate as a conclusive rebuttal of the presumption arising from the proof of mailing, and that "the presumption, with the evidence of the president of the company, made an issue for the determination of the jury, \* \* \*." The Court thus clearly gave the force and weight of evidence to this presumption of receipt of a mailed notice.

<sup>23</sup> *Spaulding v. The Chicago and Northwestern Railway Company*, 30 Wis. 110, 123 (1872).

<sup>24</sup> *Pringle v. Dunn*, 37 Wis. 449, 459 (1875).

<sup>25</sup> *Reeves v. Midland Casualty Co.*, 170 Wis. 370, 377, 174 N.W. 475 (1920).

The case of *Enea v. Pfister*<sup>26</sup> involved the presumption of agency which arises from proof of ownership of an automobile driven by one other than the owner. This presumption is one of law based upon the proposition that while it is easy to prove ownership of an automobile involved in a collision, the matter of agency lies peculiarly within the knowledge of the driver and the owner and is very difficult for the injured or damaged party to ascertain. Under the doctrine of the *Spaulding* case this presumption of law merely should have placed upon the defendant owner the burden of producing evidence upon the question of agency. The Wisconsin Supreme Court, however, said that the jury was not obliged to believe the defendant owner's testimony to the effect that no agency existed. The Court also said that

"\* \* \* while the evidence on the part of a defendant may be so clear and convincing as to overcome the probative force of the inference justified by the fact of ownership, the evidence on behalf of the defendant in this case is not of that order and the finding should not have been disturbed by the trial court."

It is thus apparent that the Supreme Court treated the presumption of agency as one affecting the burden of persuasion.

Since the *Enea* case, the Wisconsin Supreme Court has considered this presumption of agency from ownership in a number of cases and has developed two lines of apparently conflicting authority.<sup>27</sup> Under the *Enea* line of cases, as shown above, the presumption is permitted to affect the burden of persuasion.<sup>28</sup> Under the opposing line of authority, which is best represented by the case of *Philip v. Schlager*,<sup>29</sup> the presumption is declared to be a legal rule governing the order and burden of proceeding with the evidence which exhausts its purpose and disappears when met by opposing evidence which the jury have a right to believe. It is probable that one of these lines of authority will ultimately triumph, but even though it does the state of the Wisconsin law with respect to the effect of presumptions will be far from clear.

In considering another presumption of law, namely, the presumption of the regularity of official acts, the Wisconsin Supreme Court in 1926 employed language which would seem to indicate that the presumption was permitted to affect the burden of persuasion. In that case,<sup>30</sup> which involved the date of entry of a judgment by the clerk of the trial court, the Supreme Court said that the presumption of regu-

<sup>26</sup> *Enea v. Pfister*, 180 Wis. 329, 332, 191 N.W. 565 (1923).

<sup>27</sup> An interesting comment discussing this presumption and suggesting a basis of reconciliation of these conflicting decisions appears in 1941 Wisconsin Law Review 521.

<sup>28</sup> *Borger v. McKeith*, 198 Wis. 315, 224 N.W. 102 (1929); *Laurent v. Plain*, 229 Wis. 75, 281 N.W. 660 (1938).

<sup>29</sup> *Philip v. Schlager*, 214 Wis. 370, 376, 253 N.W. 394 (1934); See also, *Zurn v. Whatley*, 213 Wis. 365, 251 N.W. 435 (1933).

<sup>30</sup> *Netherton v. Frank Holton & Co.*, 189 Wis. 461, 463, 205 N.W. 388 (1926).

larity of official acts is "only a presumption which fails when rebutted by clear and satisfactory proof." It would seem that if the presumption does not fail until the proof is clear and satisfactory, then the presumption has not only affected the burden of producing evidence, but has also affected the *quantum* of evidence necessary to establish a given fact in a given case. In 1937 a similar interpretation was placed upon the presumption that a note is presumed to have been issued for a valuable consideration. In that case<sup>31</sup> after adverting to the presumption, which is clearly a presumption of law, the Court said that it perceived no reason why the *quantum* and sufficiency of the proof necessary to establish want of consideration in a promissory note should not be at least as great as that required to establish a mistake, that is, clear, convincing, and satisfactory.

In the case of *Dehmel v. Smith*<sup>32</sup> the plaintiff was injured while descending in an elevator from the seventh to the main floor of the Pfister Hotel. Before reaching the second floor the elevator suddenly dropped, descending into a pit or well approximately two feet below the main floor. The Court stated that the doctrine of *res ipsa loquitur* raised a presumption of negligence on the part of the operator of the hotel. In considering this presumption of negligence the Supreme Court said,

"It is not intended by the above to question the rule that the burden of proof is upon the plaintiff in cases where the *res ipsa loquitur* doctrine applies. [Citations omitted.] In such cases, however, when the plaintiff proves facts that make the doctrine applicable, it devolves on the defendant to produce evidence to overcome the presumption of negligence. If he does so, the plaintiff must then produce evidence in refutation. But if he fails to do so, the plaintiff with aid of the presumption has lifted his burden. If the defendant's evidence is not sufficient to overcome the presumption, the plaintiff need not offer evidence in refutation. Whether it is sufficient to do so may be for the court to determine or it may be for the jury." (Italics added)

The presumption in this case was one of law created by the doctrine of *res ipsa loquitur* and, according to the orthodox view and the doctrine announced by the Wisconsin Supreme Court in the *Spaulding* case, *supra*, should have affected only the matter of production of evidence. The Court recognized this effect of the presumption in its statement that the raising of the presumption placed upon the defendant the burden of producing evidence to overcome it, but then proceeded to state that the question whether the evidence produced by the defendant is sufficient to overcome the presumption may be one for the jury. If that is true, it would seem that the presumption has per-

<sup>31</sup> Estate of Flierl, 225 Wis. 493, 499, 274 N.W. 422 (1937).

<sup>32</sup> Dehmel v. Smith, 200 Wis. 292, 297, 227 N.W. 274 (1930).

sisted beyond the production of evidence by the defendant, and has itself acquired the force of evidence to be compared in weight with the evidence produced by the defendant. This is a clear departure from the doctrine of the *Spaulding* case.

In two automobile cases considered by the Wisconsin Supreme Court in 1931 and 1937, respectively, the question of the negligence of the deceased automobile drivers was presented. In each case the presumption that the deceased had exercised due care for his own safety was relied upon. In the first of these cases<sup>33</sup> the Supreme Court said that this presumption is very substantial, and that "while it does not constitute affirmative evidence that due care was exercised, it does require proof to the contrary in order to remove its persuasive force." In the second of the two cases<sup>34</sup> the Court made the following statement with respect to the presumption of due care:

"The presumption to which the requested instructions relate only exists in the absence of actual evidence as to what the conduct of Oshkosh actually was. It disappeared upon the introduction of evidence establishing as a fact the negligence of deceased. Its function ceased when it had regulated the burden of going forward with such evidence and had been rebutted by actual evidence relevant to the issue. Plaintiff Oshkosh was not entitled to have this presumption thrown into the scales and weighed by the jury in finding the facts. This would give the presumption standing as actual evidence. That it is entitled to no such standing is well established. It is said in 5 WIGMORE, EVIDENCE (2d ed.) § 2491:

"'. . . It must be kept in mind that the peculiar effect of a presumption "of law" . . . is merely to invoke a rule of law compelling the jury to reach the conclusion *in the absence of evidence to the contrary* from the opponent. If the opponent *does* offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule.'"

The statements of the Court in the above cases would seem to constitute a re-assertion in Wisconsin of the doctrine that a presumption of law does not affect the burden of persuasion in the trial of a law suit.

At the next term of the Supreme Court after that at which the second of the above cases was decided, however, another presumption of law was considered, viz.: the presumption of the correctness of official acts, in this instance the presumption of the correctness of an

<sup>33</sup> *Seligman v. Hammond*, 205 Wis. 199, 236 N.W. 115 (1931).

<sup>34</sup> *Smith v. Green Bay*, 223 Wis. 427, 429, 271 N.W. 28 (1937).

assessor's valuation of property. In its decision in this case<sup>35</sup> the Court made the following statement:

"It is contended that the rule that an assessor's valuation is *prima facie* correct is a mere presumption; that it does not constitute evidence; and that it disappears upon the introduction of any evidence showing it to be incorrect or inaccurate. *Smith v. Green Bay*, 223 Wis. 427, 271 N.W. 28. The evidence in this case must be considered to be unimpeached and uncontradicted."

As appears from this quotation, the Court recognized, and cited itself as authority for, the orthodox rule that a presumption of law disappears upon the introduction of "any evidence showing it to be incorrect or inaccurate." The Court then proceeded to take note of the fact that the evidence offered against the presumption in the case before it was unimpeached and uncontradicted. It would seem that such evidence should have been sufficient to meet the requirement of "any evidence." Despite this fact, however, the Court said that it was concerned solely with the effect of the evidence and stated that if the evidence "demonstrated the incorrectness of the assessor's valuation, it would rebut the presumption of correctness attached by law to the valuation." Such language is not consistent with the orthodox rule. If the effect of the evidence introduced against a presumption must be considered in order to determine whether it demonstrates that the presumed fact is untrue before the presumption can be said to be rebutted, the presumption has certainly affected the burden of persuasion.

Thereafter, in 1939, the Wisconsin Supreme Court again gave voice and effect to the orthodox doctrine, declaring that the presumption of the continuance of a condition or status once proven to exist is not evidence and disappears entirely from the case when some uncontradicted, unimpeached, and not inherently incredible evidence to the contrary is introduced.<sup>36</sup> In the case in which the foregoing declaration was made, the Court held that the evidence introduced against the presumption of continuance was such as to compel the conclusion that a certain individual was not a corporate officer after a certain date, although it had been proved that he was such officer at an earlier date.

The inconsistency of the decisions of our Supreme Court with respect to the effect of presumptions and the tendency of the Court to permit presumptions to affect the burden of persuasion is also demonstrated in a series of cases dealing with the presumption against suicide. This presumption is one of law, based upon the common experience of man's love for and struggle to preserve life. In 1900,

<sup>35</sup> State *ex rel.* Collins v. Brown, 225 Wis. 593, 595, 275 N.W. 455 (1937).

<sup>36</sup> State *ex rel.* Northwestern Dev. Corp. v. Gehrz, 230 Wis. 412, 283 N.W. 827 (1939).

in a case involving the presumption against suicide, the Court said that it is a rebuttable presumption and "easily yields to physical facts clearly inconsistent with it."<sup>37</sup> In 1915, the Court said, with respect to the same presumption, that it "persists in its legal force to negative the fact of suicide until overcome by evidence."<sup>38</sup> In 1931, again considering the presumption against suicide, the Court said that when suicide is alleged in defense of a liability, the burden is on the one alleging suicide to establish it as a fact.<sup>39</sup> In 1940 the Court said that the presumption of law against suicide is rebuttable, but that "it is only rebutted by the production of evidence which establishes the fact of suicide *to a reasonable certainty*."<sup>40</sup> (Italics added) These decisions indicate that our Court was at first inclined to treat this presumption against suicide, in accordance with the orthodox view, as a presumption which merely affects the burden of producing evidence and which easily yields to such evidence when produced. Thereafter, however, the Court apparently gave the presumption against suicide a force in the nature of evidence, clearly permitting it to affect the burden of persuasion.

It would appear from the foregoing analysis of the Wisconsin cases dealing with the effect of presumptions, that while the Wisconsin Supreme Court early and late has done lip service to the doctrine that a presumption of law affects only the burden of producing evidence and not the burden of persuading the trier of the facts, it readily departs from that doctrine in practice and permits presumptions, both of law and of fact, to affect the burden of persuasion. It is true that some presumptions of law, such as those which have their origin in the balancing of probabilities, possess basic facts which bear some probative relation to the presumed fact of the presumption. Any attempt to relate the Wisconsin decisions to the proposed Code of Evidence upon this basis will fail, however, for not a few of the presumptions which have been given the force of evidence by our Court have been presumptions created, not by a balancing of probabilities, but rather as rules of convenience or in the interests of public policy. Among these, as has been shown above, are such artificial presumptions as that of the regularity and correctness of official action, that a promissory note is supported by consideration, that the driver of an automobile owned by another is the agent of the owner, that a notice which has been mailed has been received, and so on. Certainly the basic facts of these presumptions have no probative value as to the existence of their presumed facts.

<sup>37</sup> *Agan v. The Metropolitan Life Ins. Co.*, 105 Wis. 217, 80 N.W. 1020 (1900).

<sup>38</sup> *Milwaukee Western F. Co. v. Industrial Commission*, 159 Wis. 635, 150 N.W. 998 (1915).

<sup>39</sup> *Wiger v. Mutual Life Ins. Co.*, 205 Wis. 95, 236 N.W. 534 (1931).

<sup>40</sup> *Tully v. Prudential Ins. Co.*, 234 Wis. 549, 291 N.W. 804 (1940).

An attempt to derive any principle or system from the Wisconsin cases which may be said to govern the matter of the effect of presumptions will rapidly convince one that the law, particularly judge-made law, is not an exact science and that it cannot in all cases be made to fit a pattern. Our Court has not been entirely consistent either in its adherence to or departure from the orthodox view. This much may safely be said, however, that the Wisconsin practice does not conform to the rule proposed by the American Law Institute's Code of Evidence.

### RULE 3. EFFECT OF INCONSISTENT PRESUMPTIONS

The third rule of the proposed Code of Evidence states that where inconsistent presumptions have been established in an action, if the presumptions are alike in that their basic facts either have no probative value or have any probative value as evidence of the existence of their presumed facts, then the question of the existence or non-existence of the presumed fact of each presumption is to be determined exactly as if neither presumption had ever been applicable in the action. The third rule also provides that if the basic fact of one of the inconsistent presumptions has no probative value as evidence of the existence of its presumed fact and the basic fact of the other presumption has any probative value of the existence of its presumed fact, whether or not such probative value is sufficient to support a finding of the presumed fact, the burden of persuasion is upon the party asserting the non-existence of the presumed fact of the latter presumption. This problem of the effect of inconsistent or conflicting presumptions has received very little consideration in the Wisconsin cases. The writer has found no case in which our court has discussed this matter at any length. There is some indication of the problem, however, in two very early cases.

In *Hubbard v. The Town of Lyndon*<sup>41</sup> the Court considered an appeal from an order setting aside a verdict for the defendant upon the grounds of insufficient evidence and granting a new trial. The Court raised the question whether the bill of exceptions contained all of the minutes of the Judge, upon which the motion for a new trial had been heard and decided in the lower court. The bill of exceptions recited that it was a "copy of the minutes," and the argument was made that it must be presumed, therefore, that the bill of exceptions was a copy of *all* the minutes. The Supreme Court refused to rely upon that presumption and stated that the real presumption in the case was that the court below decided properly upon the matters before it. The Court declared that this latter presumption would persist until the contrary appeared. It is apparent that the presumption upon which the Court

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<sup>41</sup> *Hubbard v. The Town of Lyndon*, 24 Wis. 231 (1869).

decided the *Hubbard* case was one of law based not upon any balance of the probabilities, but rather upon the public policy which favors the upholding of official and judicial action. If the presumption contended for by counsel was a presumption at all, it would seem that it was a presumption of fact based upon the probability that a *copy* of any particular instrument or thing is a copy of the *entire* instrument or thing. If that be the fact, the manner of resolving the conflict in presumptions was contrary to that proposed in the Code. There may be some doubt, however, as to the nature of this alleged presumption. In any event the decision of the Court in the *Hubbard* case does not discuss the conflict and gives little assistance to one attempting to ascertain the Wisconsin practice with respect to the effect of conflicting presumptions.

In the case of *Gough v. Dorsey*<sup>42</sup> the question considered was one of priority between two applicants for purchase of state lands. The plaintiff deposited an application and the requisite percentage of the purchase money with the State Treasurer pending the removal of certain defects in the title and the preparation of the necessary papers for the execution of a purchase money mortgage. Thereafter the defendant, in accordance with the Wisconsin Statutes, filed with the Secretary of State a written application for purchase of the same land, offering to pay all cash. This application was accepted, the money paid, and a receipt given. Thereafter an order was entered by the commissioners of school lands vacating the sale to the defendant. The Court held that the defendant had good title to the land as against the plaintiff's claim. The proof offered upon the trial was very clear and positive to the effect that no application in writing ever came to the Secretary of State from the plaintiff until after the defendant's application had been made. Upon the argument, counsel for the plaintiff relied upon the presumption in favor of the correctness of official action as supporting the commissioners' cancellation of the defendant's entry. The Supreme Court stated that there was an equally strong presumption to the effect that if a previous application had been duly made by the plaintiff, it would have been shown by proper entries in the books; also that there was a presumption that the application itself would have been found in the proper place. After calling attention to these conflicting or inconsistent presumptions, the Court said,

"The presumption, therefore, affords no aid to the plaintiff; \* \* \*  
The question must be decided upon the evidence, as it appears without the presumption."

This decision of the Wisconsin Supreme Court is in accordance with the third rule of the proposed Code of Evidence in that it required

<sup>42</sup> *Gough v. Dorsey*, 27 Wis. 119 (1870).



the question before the Court to be determined as though no presumption existed in a case in which the conflicting presumptions were both presumptions of law, the basic facts of which possessed no probative force in themselves.

In the case of *Nygaard v. Wadhams Oil Company*<sup>43</sup> the plaintiff's decedent was fatally burned by an explosion which resulted when he attempted to light a fire with kerosene purchased from the defendant. It appeared that gasoline had been mixed with the kerosene. The question was raised whether the improper mixing was the act of the wholesaler's delivery man, the act of the filling station attendant, or the act of an intermeddler. The Court ruled out the possibility that it was the act of an intermeddler stating that in the absence of evidence to that effect the presumption against intentional wrongs and in favor of innocence must control. It then concluded that the mixing was the negligent act of the wholesaler's delivery man. It has been suggested that there is also a presumption against negligence which must have conflicted with this presumption against intentional wrong,<sup>44</sup> and that the Court's decision implies that there is greater force in the presumption of innocence than in the presumption against negligence. It is questionable that such a conflict of presumptions received any articulate consideration at the hands of the Court inasmuch as no mention of it was made in the decision. The conflict does exist, nevertheless, and if it was consciously resolved in favor of the presumption of innocence and against the presumption against negligence, the resolution must have been upon some basis other than that of the proposed Code of Evidence. Both of those presumptions are presumptions of law and neither is based upon facts having probative value with respect to the existence of their presumed facts. Under the Code the matter should have been determined as though neither presumption existed. The Wisconsin Supreme Court, however, recognized and gave effect to the presumption of innocence.

In view of the want of discussion of this matter of inconsistent or conflicting presumptions in the Wisconsin cases, no adequate comparison can be made of the Wisconsin practice in that regard with the rule proposed by the American Law Institute's Code of Evidence. As has been shown by the cases above mentioned, there are indications both that the Wisconsin practice is consistent with and that it is opposed to the rule of the Code.

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<sup>43</sup> *Nygaard v. Wadhams Oil Co.*, 231 Wis. 236, 284 N.W. 577 (1939).

<sup>44</sup> *The Work of the Wisconsin Supreme Court*, 1940 Wis. L. Rev. 5, 49.

## CONCLUSION

In the words of the late Judge Jones,

"The history of jurisprudence illustrates the fact that among judges as among legislators there is a constant struggle, however ineffectual it may be, to approach uniformity in the law."<sup>45</sup>

Inasmuch as justice is or should be no respecter of persons, the effort to obtain uniformity is highly laudable. The late Justice Oliver Wendell Holmes is reputed once to have said that it is almost equally important that the law be certain as that it be right. With these thoughts in mind, it seems indubitable that the uniformity and certainty of the American Law Institute's proposed Code of Evidence is preferable to the inconsistency and state of flux of the Wisconsin practice in the field of effect of presumptions. The question remains, however, whether the rules proposed by the Code are preferable to the so-called orthodox rule of Wigmore or the more radical proposal of Morgan.

Under Morgan's proposal all presumptions would be given the weight of evidence, placing upon the opponent of the presumed fact the burden of persuading the trier of fact of the untruth or non-existence of that fact. Since there are numerous presumptions in the law which are not based upon a balance of probabilities, but rather are created as rules of convenience or in the interests of public policy, it does not seem advisable or equitable that all presumptions should be given the force of evidence. It may be true that there are certain inferences of fact which are so socially or procedurally desirable as to warrant their compulsion unless contrary to the weight or preponderance of the evidence, despite the want of a balance of the probabilities in their favor. It would seem, however, that a more direct approach to the problem would be to adopt substantive rules of law dealing with each such situation individually. By that method a more delicate and accurate adjustment of the law to the normative may be obtained than by a blanket rule giving evidentiary weight to all presumptions, whether probative in nature or not. It is a verity that the *quantum* of proof desirable to rebut varying presumptions may reasonably vary, particularly with respect to presumptions created in the interests of procedural convenience and public policy.

Under Wigmore's theory no presumption, no matter how great the probabilities in its favor, is given the weight of evidence. After compelling the opponent of the presumed fact to produce some credible evidence to the contrary, the presumption disappears, having exhausted its strength and usefulness. Wigmore defends this limitation of the effect of presumptions by asserting that if the basic facts of the presumption are themselves possessed of probative force, the inferences

<sup>45</sup> 1 JONES, THE LAW OF EVIDENCE IN CIVIL CASES (4th ed., 1938) 14.

to be drawn from them can still be drawn after the presumption has disappeared. It would seem, however, that such residual inferences are inadequate to the rendition of justice, else the courts would not so constantly permit presumptions to affect the burden of persuasion in the trial of cases. If the residual probative force of the basic facts of a presumption remaining after the disappearance of the presumption itself possesses weight as evidence by way of inference, and thereby affects the burden of persuasion, why not recognize that fact and label it openly? It would seem preferable, in the interests of uniformity and certainty in the administration of justice, that the jury's attention be directed to this probative force, rather than that it be left to the sometimes questionable intelligence and experience of the jury to draw the inferences itself. Although it may be true that Wigmore's theory has the support of time and perhaps even of nicely reasoned logic, the fact must not be ignored that jurisprudence, which deals with the constantly variable human factor, is not and probably never can be an entirely exact science.

It is generally recognized by the greater number of the text-writers and courts that presumptions are of two kinds, those of fact and those of the law. As stated at the outset of this discussion, a legal presumption is a rule of law which creates an artificial probative relation or recognizes a naturally existing probative relation between two facts. Under the rule proposed in the American Law Institute's Code of Evidence, presumptions which create an artificial probative relation between two facts affect only the burden of producing evidence, while presumptions which recognize a naturally existing probative relation between two facts also affect the burden of persuasion, placing that burden upon the party asserting the non-existence of their presumed facts.<sup>46</sup>

Upon the consideration hereinabove stated and in the interest of a greater uniformity and certainty and realism in the administration of justice between litigants, it is submitted that the provisions of the proposed Code of Evidence of the American Law Institute with respect to the effect of presumptions should be adopted.

<sup>46</sup> One objection to the Code which must not be overlooked is that it does not provide any certain method for determining whether the basic fact of any given presumption possesses probative force with respect to the presumed fact of that presumption. Presumably that responsibility lies with the Court which could take judicial notice of the existence or non-existence of the probative relation. It might be argued, therefore, that the Court could confer or deny evidentiary weight in the case of any presumption by simply recognizing or refusing to recognize a probative relation between the basic and presumed facts. The answer to this argument would seem to be that the Court's action is subject to review. Also it must be observed that the question of the existence of the probative relation will arise only in certain borderline cases and that in those cases the question can be submitted to the jury as an issue of fact in the form of an introductory question in the special verdict.